FILED
JUL 19 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1628

TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

ROBERT C. BARNARD
R. MICHAEL DUNCAN
DAVID Z. ROSENSWEIG
Attorneys for Petitioners Teleprompter Corporation and Conley Electronics Corporation

Of Counsel:
CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

KATZ, LEAVY, ROSENSWEIG & SINDLE
437 Madison Avenue
New York, New York 10022

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1628

TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
CALVADA PRODUCTIONS, a joint venture,
JACK CHERTOK TELEVISION, INC., and
DENA PICTURES, INCORPORATED, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY BRIEF

---

1. *Fortnightly* established that CATV reception of broadcast signals and making those signals available to members of the public who chose to subscribe to the CATV service is not a performance of the copyrighted work which was broadcast. The court below, in holding that such a reception service was a "performance" "in public", adopted a novel doctrine that the type of antenna and its location determines whether the CATV reception service is transformed into a "performance".

Fortnightly made clear that the critical issue is not equipment or technology used in the CATV reception service, but rather the function which the CATV performed. The court below has adopted a rule which

makes one particular antenna technology a determinant of copyright liability.

The important issue presented on this petition is whether such a rule grounded on one kind of antenna technology conflicts with this Court's decision in *Fortnightly*. Television service for millions of homeowners, who are members of the public for which a broadcast must be intended as a matter of law, will be denied under such a rule. The question presented is a major issue on which the law is unsettled.

2. Respondents' arguments to escape the conflict between the rule of the court below and *Fortnightly* are based on confusion, errors and prophecies of some possible future conduct (e.g., reception of a broadcast in Tokyo) [1] having nothing to do with the facts in this case.

Respondents recognize that a central question in applying this Court's decision in *Fortnightly* is whether petitioners' reception service is "on the viewer's side of the line." In distinguishing a CATV function from a broadcaster's function, this Court pointed out in *Fortnightly* that a broadcaster selects and procures the program and converts the program into electronic signals which he transmits to the public (392 U.S. 397-401). A broadcaster is engaged in selling time and facilities to sponsors. On the other hand, petitioners' CATV systems have nothing to do with program content or arrangement, and merely sell their reception service to a member of the public for whom the broadcast was intended. *Id.*, p. 400, n. 28.

Recognizing that petitioners' CATV systems had no more concern or control over the programs broadcast than did the CATVs in *Fortnightly*, respondents seek

---

[1] Respondents' Brief in Opposition (hereinafter cited as "Opp."), 22.

to create a contrary impression by confusion. Thus petitioners are charged with "deliberately" choosing to "import" signals of stations because of the "type of programming" they had to offer (Opp., 6, 7). Respondents also assert that one "imported" station was received "on only a part time basis to accommodate the programming needs" of the CATV (Opp. 7).

This conduct, which respondents assert is "selection" and "procurement" (Opp. 12) of programs by the CATV, is precisely what the CATV did in *Fortnightly*. Calling selection of a station to be received "deliberate", and the part time reception of a station (Durango by the Farmington CATV—Opp. 6n**) when the educational station received by the CATV was not broadcasting [2] a "programming" need, is an effort to confuse the facts as to the CATV reception function to create a false analogy to the broadcaster's function of program selection and responsibility. Respondents' arguments as to the CATV "bypassing" other stations in this alleged "selection" process (Opp. 6, 8) disregard the testimony that the CATVs were dependent on available microwave links and that the decisions on this alleged "selection" were based on whether such microwave was available. JA 568-69.

Respondents assert that petitioners' CATVs are like network affiliates and paint the affiliate as a passive retransmitter of network programming (Opp. 13); but that network affiliate, however passive in the eyes of the network, is legally and personally responsible as a broadcaster for each program broadcast (JE 493)—a fact which the network contract explicitly recognizes

[2] Respondents' assertion with respect to carriage of "only particular segments" of the Durango station's broadcasts (Opp. 6 n**) is factually incorrect as a generalization. The Durango station was carried full time on the Farmington CATV as soon as the system's equipment was modernized to 12 channel capacity. See JA 187, 188 n*, 267-68.

(JA 294-95, 304, JE 252-55). The CATV has no such responsibility.

3. Respondents here, as did the court below, rely almost exclusively on a sentence from this Court's decision in *Southwestern* (Opp. 11-12). They recognize that the definition of "distant signals" (392 U.S. at 163, n. 16) which this Court referred to in the context of Communications Act regulation was not adopted by this Court "for copyright purposes", but in an effort to give the *Southwestern* sentence copyright significance they assert erroneously that under the F.C.C. current definitions, "*all* the signals received by the Fortnightly CATVs were local with respect to those systems." Opp. 12 *(emphasis in original).

Under the definition of "distant signals" in effect at the time of *Fortnightly*, five of the stations received were "distant"—i.e., the CATV system was outside the B contour of these stations (377 F.2d at p. 883, 47 C.F.R. §74.1101(i)(1968)). Under the current definition of "distant signals" adopted by the F.C.C. for regulatory purposes, and contrary to respondents' statement, at least four of the stations received by the Fortnightly CATVs remain "distant signals." The CATVs are still outside the B contour of these stations but more importantly under the current regulation, they are outside the smaller "specified zone" of these stations (see 47 C.F.R. (§76. 59(a)(1)).[3] One station which was "distant" under the old rule is "significantly viewed" in Clarksburg's county and thus no longer "distant", under the new rule.[4]

---

[3] The "specified zone" is the "area extending 35 air miles from" a specified reference point in the television station's community. 47 C.F.R. § 76.5(f). The B contour is at a greater distance for VHF stations than the 35-mile distance used for the specified zone.

[4] The Commission's new "distant signal" rules determining which stations a CATV must, upon demand, receive depend for

4. Recognizing that the rule constructed by the court below cannot be justified by the "distant signal" concept originally adopted and subsequently modified by the F.C.C. solely for regulatory purposes in its mandatory carriage rule, respondents prefer to refer to "imported" signals rather than "distant signals." But, despite respondents' misleading suggestion,[5] there can be no dispute that Durango—which was held by the court below to be "distant"—was, and is, a "local station" required to be received under the F.C.C.'s mandatory carriage rules. Farmington is not distant from Durango in any mileage sense (43 miles) and is within Durango's B contour (JA 186), and hence the Durango station is "local" under the applicable F.C.C. rule (47 C.F.R. §76.57). Thus despite their efforts to confuse the issue, respondents ultimately must confront the holding by the court below that *CATV reception of a "local" station in compliance with the F.C.C.'s requirements* is converted in some manner into a "performance", and therefore an infringement, because the CATV antenna was not located in or near the CATV community.

---

their application on the location of the CATV in relation to classification of the television market in which the CATV is located. The Fortnightly CATV systems are not in one of the 100 major television markets, but are located within one of the smaller television markets. Consequently, the applicable current rule is 47 C.F.R. § 76.59.

The finding as to which stations are "significantly viewed" in Harrison and Marion Counties of West Virginia where the Fortnightly CATVs are located appears at 36 F.C.C. 2d at 460. Of the stations received in 1964 which were distant because the CATV was beyond their B contour under the old rule—WTAE, WIIC, KDKA (Pittsburgh), WSTV (Steubenville) received by the Clarksburg CATV and WIIC (Pittsburgh) received by Fairmont—only WTAE is significantly viewed in Harrison County and accordingly no longer "distant" for purposes of the current rule.

[5] In the context of a reference to the Durango station, respondents assert that "the FCC no longer considers all Grade B signals

5. Respondents seek to overcome the overwhelming economic evidence that petitioners' CATV systems are within the coverage area of the television stations received (see discussion of facts in the Petition, pp. 14, 39-42), by asserting that the economic facts are "insignificant" (Opp. 18) and that it is "irrelevant" that stations claim this CATV coverage (Opp. 23 n*).[6] Respondents would have the Court disregard the economic data, the rating services, and industry economics upon which station rates are based and programs sold to stations and pay attention only to the copyright owner's assertion as to preferred economics which enables him to maximize his reward or to preserve the network structure.

To buttress their argument, respondents seek to revive an argument of unfair competition (Opp. 20-23) urged and rejected in *Fortnightly*. Respondents quote at length and out of context from the 1968 interim opinion and order of the Commission in its lengthy cable television inquiry. Opp. 21, 23. In that order the Commission was concerned with what were desirable rules as to "distant signals" and nonduplication under the public interest standards of the Communications Act; the Commission explicitly stated that it

---

local" (Opp. 29, n*). Although respondents' generalization is correct in the context of CATVs located within television markets, their statement when applied to reception of the Durango station in Farmington is wrong.

Farmington is located outside the 100 major and all smaller television markets, and therefore the applicable current rule is 47 C.F.R. §76.57. The Farmington CATV is required to carry all stations within whose Grade B contours Farmington is located. *Ibid.*

[6] Similarly, respondents attempt to suggest that coverage provided to stations through CATV is "never" of relevance to advertisers' decisions to buy (Opp. 18). Respondents do not explain,

was not concerned "with unfair competition from the aspect of the copyright owner."[7]

Respondents' assertion (Opp. 22) that a copyright owner cannot base royalty negotiations on a coverage area which may be changed at the "whim" of the CATV overlooks the fact that it is the F.C.C. which determines which stations may be received by CATV and hence the stations' coverage. The F.C.C. CATV rules and the Commission's grant of microwave licenses are the critical factors in determining the public which will be in a station's coverage area. The measurement of that coverage by the rating services is what is used by the television industry, including respondents. When the Commission has determined what reception service CATV can offer the public, the copyright statute should not be construed to permit the copyright owner to nullify the F.C.C. rules by a private choice as to what stations the public may receive made by the copyright owner for his own private economic reasons.[8]

---

however, why stations take the trouble and expense to emphasize CATV reception of their signals in brochures aimed at advertisers and time buyers (see, *e.g.*, JE 357-58, 373-81, 459-68), and do not mention their own witnesses' testimony on cross-examination that stations are highly interested in all coverage for their signals. JA 308, 385.

[7] *Notice of Proposed Rulemaking and Notice of Inquiry*, in Docket No. 18397, 15 F.C.C. 2d 417, 431-2, ¶¶ 36, 37 (1968). In this opinion, the Commission proposed an experimental use of "retransmission consent" for distant signals, a proposal abandoned in the *Cable Television Report and Order*, 36 F.C.C. 2d 141, 165 (1972). In place of the rule proposed in 1968, the Commission in its 1972 *Cable Television Report and Order* adopted the current distant signal rules, including the exclusivity rules with respect to CATV reception.

[8] Respondents assert (Opp. 21 n*), contrary to the facts, that TelePrompTer has asserted "its rights" under the Copyright Act in complaining of "unfair competition", citing comments in

6. In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 199 n. 5 (1931), this Court left open the issue of a license implied-in-law to receive a broadcast, citing *Buck* v. *Debaum*, 40 F.2d 734 (S.D. Cal. 1929) where such an implied license was upheld. Respondents argue (Opp. 27-28) that such a license would mean that the broadcast work is "dedicated to the public" and cite the cases[9] which establish that each station rebroadcasting a network program is a performer.

Petitioners' point, which respondents attempt to obscure, is that when a copyright owner elects to use television to exploit his work, he takes that medium as it is as a matter of fact and law. It is the broadcast which the copyright owner authorized which is "dedicated" by statute for reception by the public, not the copyrighted work. The "dedication" is merely the right of the public to receive the broadcast. A network station, which as a matter of law is an originator and performer, gets no right to rebroadcast the program as a result of the original broadcast. Rebroadcasting is not

---

an inquiry of the F.C.C. on proposed rules regarding the providing of pay TV services to hotels, etc. In its comments TelePrompTer urged that a CATV company providing pay TV services should be on the same footing as others. No question of copyright was involved since any operator cablecasting pay TV must concededly secure the consent of the copyright owner. In its comments TelePrompTer urged that regulatory burdens on CATV operators (e.g., franchise fee, minimum number of channels, provision of access channels and two-way capacity) together with a limitation on the motion picture and sports programming which a CATV operator could provide on pay TV placed the CATV operator at a disadvantage as against those not subject to those burdens and regulations. Comments of TelePrompTer Corporation, pp. 13-14 in *In the Matter of Various Methods of Transmitting Program Material to Hotels and Similar Locations, etc.*, F.C.C. Docket No. 19671, et al (1973).

[9] Opp. 28 n* at end.

part of reception by the public. It is an independent act of performance for which the broadcaster is legally and personally responsible. Unless the broadcaster has the copyright owner's permission to perform, he is an infringer.

Reception by the public, on the other hand, is a right arising under the Communications Act, since a broadcast must be "intended to be received by the public" 47 U.S.C. §153(o). Likewise, under the Constitution and the Copyright Act, the public has the right to receive the particular embodiment of the copyrighted work the author has released to the public—the broadcast.

7. Despite respondents' argument that "no one seeks to stop the importation of distant signals by Teleprompter" (Opp. 16) and that all the copyright owners want is for CATV to "pay royalties for the use of those programs" (Opp. 17), CBS has already announced that its purpose in bringing this case is market regulation to protect the "present system of nationwide program distribution by the television networks through their affiliated stations" (JE 470), and that if it prevailed, CBS would grant copyright licenses at "only a nominal fee" (JE 471) in situations where CBS approves the reception as a network matter. Thus CBS' intention to refuse copyright licenses on any terms when the CATV "imports" signals from one market (as the "market" is defined by CBS) to another is already clear. The effect of CBS' plans will clearly be loss of television service to millions of persons relying on CATV for their television reception, as well as the destruction of the F.C.C. regulatory plan for CATV integrating the service it provides into the national communications structure.

CONCLUSION

For the reasons stated, the decision of the court below that CATV reception of what the court defined as "distant signals" constitutes a "performance", and therefore a copyright infringement, raises an important question which should be reviewed by the Court. The writ should be granted.

Respectfully submitted,

ROBERT C. BARNARD
R. MICHAEL DUNCAN
DAVID Z. ROSENSWEIG
Attorneys for Petitioners Teleprompter Corporation and Conley Electronics Corporation

Of Counsel:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

KATZ, LEAVY, ROSENSWEIG & SINDLE
437 Madison Avenue
New York, New York 10022

July 19, 1973